

MATTHEW D. POWERS (Bar No. 104795)
matthew.powers@weil.com
EDWARD R. REINES (Bar No. 135960)
edward.reines@weil.com
JEFFREY G. HOMRIG (Bar No. 215890)
jeffrey.homrig@weil.com
WEIL, GOTSHAL & MANGES LLP
Silicon Valley Office
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Telephone: (650) 802-3000
Facsimile: (650) 802-3100

Attorneys for Plaintiff
NETWORK APPLIANCE, INC.,

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NETWORK APPLIANCE, INC.

Plaintiff,

v.

SUN MICROSYSTEMS, INC.

Defendant.

Case No. 3:07-CV-06053-EDL

**NETWORK APPLIANCE'S MOTION
FOR ADMINISTRATIVE RELIEF
REQUESTING A PROMPT CASE
MANAGEMENT CONFERENCE**

1 Pursuant to Federal Rule of Civil Procedure 16 and Civil Local Rule 7-11, plaintiff
2 Network Appliance, Inc. ("NetApp") respectfully requests that the Court reschedule the initial
3 case management conference ("CMC"), currently set for March 11, 2008 at 10:00 AM to
4 January 8, 2008 at 10:00 AM or, if not then, no later than January 23, 2008.

5 NetApp filed this case because Sun Microsystems, Inc. ("Sun") is "open-sourcing" what it
6 calls "ZFS" file system software code. That software code incorporates many of the patented
7 features developed by NetApp that have distinguished NetApp's products from the competition
8 and have made them extremely successful. Sun, by injecting infringing code into the public
9 domain, is infecting open-source code and creating very harmful consequences both in the
10 marketplace and to the open-source community. One aspect of the relief NetApp plans to seek in
11 this case will be an injunction preventing Sun from continuing to support, update, and proliferate
12 infringing open-source software.

13 Because time is of the essence to prevent the further proliferation of the infected
14 open-source software code, this case was initially filed by NetApp in Texas in view of that
15 venue's reputation for speed. In response, defendant Sun Microsystems, Inc. ("Sun") threatened
16 to file a transfer motion. To avoid undue delay and dispute, NetApp agreed to the transfer of this
17 case to Your Honor with the explicit understanding that the parties would facilitate the prompt
18 resolution of this case. Indeed, a key aspect of the parties' agreement was that the parties would
19 willingly schedule and participate in a prompt CMC before this Court. This agreement is
20 reflected in the Agreed Motion to Transfer filed in Texas confirming that Your Honor "has agreed
21 to hear this matter and to conduct a prompt Case Management Conference." Reines Decl. Exh. A
22 at 1-2.

23 That the parties agreed to seek a prompt CMC in this case is undisputed. In fact, the
24 parties held a teleconference with Your Honor in which they confirmed, before they entered into
25 their agreement, that this Court could accommodate a December CMC date to get this case
26 moving forthwith upon arrival in this District. Not once during the discussion with Your Honor
27 did Sun object to a December CMC. More recently, Sun has expressed an unduly stingy view of
28 the meaning of a prompt CMC, explaining its understanding of the objective of a prompt CMC to

1 be merely to ensure that a CMC would be held no later than if this case had remained in Texas:
2 “We agreed to a prompt CMC in the Texas case, so as to not materially delay the progress of that
3 case in light of the transfer.” Reines Decl. Exh. B at 3.

4 In view of the parties’ agreement, NetApp approached Sun to suggest January 8, 2008 for
5 the CMC. Given the upcoming holidays, this date is reasonably prompt. Setting the CMC for
6 January 8, 2008 would allow this case to move forward without unreasonable delay. That date
7 also makes sense because it was earlier than the January 23, 2008 CMC entered by the Texas
8 court, see Reines Decl. Exh. C at 1, which is the latest date that comports with either party’s
9 understanding of their agreement to schedule a “prompt” CMC. Indeed, Sun’s original response
10 appeared to be open to an early January conference in this case.¹ But when NetApp asked Sun to
11 confirm whether it was agreeable to a January 8, 2008 CMC, Sun dragged its feet and failed to
12 provide a definite response. Indeed, Sun had still not provided a substantive response when,
13 today, the Clerk issued a standard order setting the CMC for March 11, 2008. Based on that form
14 order, Sun now takes the position that the March 11 CMC date is appropriate – despite the fact
15 that, if this case had remained in Texas, the CMC would occur months earlier. Reines Decl. Exh.
16 B at 1.

17 Regardless of whether Sun’s current position is an opportunistic attempt to delay
18 NetApp’s case, the fact remains that, even under Sun’s own interpretation of the parties’
19 agreement, the CMC should not be held any later than January 23, which is when the CMC would
20 have been held in Texas. Moreover, the faithful implementation of the parties’ agreement would
21 be to hold the CMC as soon as practical. January 8 is practical and Sun has not identified any
22 scheduling conflict that would prevent it from appearing on that date.

23 In conclusion, the Court should set the CMC in this case for January 8, but in no event
24 later than January 23. NetApp entered into the agreement to have this case transferred to this

25 ¹ Sun did, however, express serious concern about a January CMC for the case originally
26 assigned to Judge Ware, Case No. C 07-05488, because of the practical problems presented by
27 the state of the pleadings in that case. Reines Decl. Exh. B at 4. In that case, NetApp’s answer is
28 not due until December 21, and it does plan to bring number of patent infringement claims when
it files that answer. Given that record, NetApp agrees with Sun that a January CMC is
impractical for that case. *Id.* at 3.

1 Court in reliance on the express and documented understanding that this Court would move this
2 case forward. Delaying the CMC for months beyond when it would have been held in Texas is
3 unfair and disturbingly at odds with the arrangement that brought this case to this Court. The
4 Court should therefore grant NetApp's motion, and a prompt CMC should be held on January 8.

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6 Dated: December 4, 2007

Respectfully submitted,

7
8 /s/ Edward R. Reines

Matthew D. Powers

Edward R. Reines

Jeffrey G. Homrig

Jill J. Ho

WEIL, GOTSHAL & MANGES LLP

201 Redwood Shores Parkway

Redwood Shores, CA 94065

Telephone: (650) 802-3000

Facsimile: (650) 802-3100

13 Elizabeth Weiswasser

WEIL, GOTSHAL & MANGES LLP

767 Fifth Avenue

New York, NY 10153

Telephone: (212) 310-8000

Facsimile: (212) 310-8007

ATTORNEYS FOR PLAINTIFF